(3)

No. 91-973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF ILLINOIS, ex rel. ROLAND W. BURRIS, Attorney General of the State of Illinois,

Petitioner,

v.

PANHANDLE EASTERN PIPE LINE COMPANY, a Delaware Corporation,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Panhandle Eastern Pipe Line Company ("Panhandle"),* submits this Brief in Opposition to the Petition for Writ of Certiorari of the State of Illinois. The Petition raises no question meriting review and should be denied.

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* Respondent Panhandle Eastern Pipe Line Company is a wholly-owned subsidiary of Panhandle Eastern Corporation.

INTRODUCTION

The Questions Presented, Opinions Below, and Statutory Provisions Involved set forth in the Petition are inaccurate or incomplete in the following respects:

The State in its Questions Presented: (1) fails to state that the only claims involved here are those under the Illinois Antitrust Act, and that no claims under federal antitrust law are involved; (2) misstates that the sale of gas in interstate commerce is unregulated, and totally ignores the Federal Energy Regulatory Commission's ("FERC") continuing pervasive regulation of pipeline services and rates; (3) misstates that Panhandle controlled a "bottleneck" or "essential facility", and tied the sale of gas to the transportation of gas, and that Panhandle's "product" (*i.e.*, its gas sales service) is "inferior." The courts below found otherwise, and the State does not challenge these findings. *See* Appendix to Petition for Writ of Certiorari ("App.") A-23-24, 5-7, 30-33; B-144-46, 209-14, 146-48, 214-22, 16, 119; (4) inappropriately addresses the business justification defense (Question 4)—the decisions below in favor of Panhandle do not rely on that defense; and (5) incorrectly asserts that the decisions below are based on the "fairness of requiring [Panhandle] to compete." (Question 5). The courts below did not rely on such a standard. The only question presented is whether the court below properly affirmed, as not clearly erroneous, the District Court's finding that Panhandle did not willfully exercise monopoly power in violation of the Illinois Antitrust Act.

The State in its Opinions Below fails to include the opinion of the District Court denying the State's motion for a preliminary injunction. That opinion is published at 603 F. Supp. 786 (C.D. Ill. 1985).

The State in its Statutory Provisions Involved errs in citing Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, because no claims under that statute are involved here.

STATEMENT OF THE CASE

The Statement of the Case bears no relationship to the regulatory and marketplace facts, and is substantially at variance with the District Court's findings and the unanimous opinion of the court below. The findings pertinent to the indirect purchaser claims for which review is sought[1] can be succinctly stated by direct reference to the decisions below:

> Despite its complex regulatory backdrop, this is a straight-forward case. In force between Panhandle and its G tariff customers, like CILCO, was an exclusive dealing contract, approved originally by the Federal Power Commission (FERC's predecessor) in 1951, that required those customers to purchase all of their natural gas requirements from Panhandle. In exchange for this sole supplier provision, Panhandle incurred an obligation to use its best efforts to meet its customers' supply requirements. To satisfy that obligation, Panhandle entered into a number of long-

[1] The State seeks no review of the dismissal of its antitrust claims under federal law in any regard, including the holdings that (a) *Kansas v. Utilicorp United, Inc.*, ___ U.S. ___, 110 S. Ct. 2807 (1990), and *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), bar its indirect purchaser damage claims (the District Court had already denied these claims on the merits), (b) its direct purchaser damage claims are unproven, and (c) its claims for injunctive relief are moot. With respect to its claims under the Illinois Antitrust Act, the State is not suing in its sovereign capacity but as a class representative for gas purchasers in Central Illinois.

term contracts to secure gas for the future. When Congress deregulated wellhead prices [through the Natural Gas Policy Act], however, a market that historically had been characterized by chronic shortages quickly found itself awash in natural gas; spot market prices soon fell well below the level at which many pipelines, including Panhandle, had contracted to purchase gas. At that point many LDC's, like CILCO, balked at paying above market rates for their gas and sought to escape their contractual obligations under the G tariff by demanding that Panhandle transport gas they wanted to purchase from other sources. At the same time, these customers wanted to hold Panhandle to its obligation to supply their contract demand quantities, should they desire to purchase them. In the words of the district court, "CILCO wanted to have its cake and eat it too." 730 F. Supp. at 886. Panhandle, obligated by its own purchase contracts to buy expensive gas, refused these demands and tried to keep its G tariff in force. The question presented in this case is simply whether Panhandle's efforts to maintain its G tariff in the face of the regulatory changes sweeping the industry violated the antitrust laws. In other words, did Panhandle violate the antitrust laws when it wouldn't give CILCO another slice?

The district court said no. (App. A-18-19) (footnotes omitted)

Panhandle owns an interstate natural gas transmission system and is a "natural gas company" as defined in Section 2 of the Natural Gas Act, 15 U.S.C. § 717a. Panhandle provides gas sales service to local distribution companies ("LDC's") in Central Illinois and other areas in the Midwest under various government-approved tariffs, including its General Service tariff ("G-tariff"). The G-tariff afforded LDC's benefits such as a favorable rate structure, seasonally adjusted purchase obligations and long-

term, secure gas supplies. App. A-6-7; B-16-17. The sole supplier provision in the G-tariff precluded G-LDC's from purchasing gas from other sources, including gas subject to phased wellhead price deregulation under the Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 ("NGPA"). App. A-5-6 n.4, 29-30; B-5-9, 114-16. The benefits of the G-tariff were of such great value that, faced with a choice of shifting to another tariff to obtain access to low-priced gas supplies, or retaining stable gas supplies and the favorable rate structure under the G-tariff, "CILCO and other LDC's opted for the latter." App. A-33.

Although Panhandle generally supplied all of the G-LDC's gas requirements, this was a direct result of Federal Power Commission ("FPC") and FERC regulatory actions and the terms of the G-tariff. App. A-26 n. 14; B-18, 98. Panhandle did not control a "bottleneck" or "essential facility" for the transportation of gas into Central Illinois due to the LDC's numerous actual and feasible interconnections with nearby competing pipelines. App. A-23; B-144-46, 209-14.

The FPC required that Panhandle have long-term gas supplies under contract sufficient to meet the purchase levels in the LDC's service agreements. App. A-26 n.14; B-15, 19-22, 98-99, 121. The severe shortage of gas supplies in the 1970's caused Panhandle to secure regulatory approval for purchases of high-priced Canadian gas and liquefied natural gas from Algeria (App. A-3-4; B-22), and to assume in its gas supply contracts onerous "take-or-pay" obligations which required Panhandle to pay for gas whether taken or not. App. A-4 n.2; B-18-22. In the early 1980's, when deliveries of this high-priced gas commenced, Panhandle's gas sales declined and it (and ultimately its customers) faced mounting take-or-pay exposure. App. A-4, 25; B-8-9, 22, 29, 107.

The NGPA authorized the FERC to provide for interstate gas sales by producers and intrastate pipelines without entangling them in federal regulation, and mandated a phased deregulation of wellhead prices. App. B-7-8. As intended by Congress, these steps increased the supply of gas available to the interstate market. App. A-4; B-8, 20. The NGPA did not, however, deregulate interstate pipeline gas sales service, invalidate pipeline tariffs and service agreements, or reduce the FERC's authority over pipeline services and rates. App. A-5 n.4, 29-30; B-7-8, 101, 168; *see also Schneidwind v. ANR Pipeline Co.*, 485 U.S. 293, 300 n.6 (1988) ("NGPA did not compromise the comprehensive nature of federal regulatory authority over interstate gas transactions").

Starting in 1983, a series of FERC transportation initiatives and judicial rejection thereof led to a period of regulatory uncertainty and chaos. App. A-7-10, 24; B-9-11, 32-35, 48-59, 174-89. The FERC began to expand pipeline transportation authority through "blanket certificate" and "special marketing" programs. Panhandle transported substantial volumes of third-party gas thereunder to industrial end-users, to LDC's purchasing under partial requirements tariffs, and even to G-LDC's. App. A-7-10, 34; B-34, 39-40, 113-14. The FERC created these programs principally to deter industrial end-users from shifting to competitive fuel oil, but they were vacated as being unduly discriminatory. App. A-8-9, 31-32; B-48, 174-80. The FERC's subsequent "open-access" transportation program (Order No. 436) expanded the authority of pipelines to transport for LDC customers, but it required sole-supplier customers (such as G-LDC's) wishing to receive transportation to shift to the pipeline's partial requirements tariff. App. A-9-10, 32-33; B-229-30. The Order No. 436 program was vacated for failing to address adequately the substan-

tial increase in take-or-pay exposure pipelines would face under open-access transportation. App. A-9-10, 35; B-11, 56. In 1987, the FERC ordered that Panhandle's G-tariff be prospectively modified by, *inter alia*, eliminating the sole-supplier provision. This order also was vacated because the tariff's substantial benefits could justify the sole-supplier provision, even given the changes in regulatory and market conditions since its approval in 1951. App. A-8; B-47-48.

The District Court did not find Panhandle made any unlawful "overcharge" for its gas sales service. (Pet. 8-9) Panhandle earned no monopoly profit on gas sales or transportation service. App. A-30-31, 33-34. It was authorized to recover only its approved costs of service, including a return on capital (established as just and reasonable by the FERC) and its actual cost of gas. App. A-30-31, 33-34; B-6, 102-06. Moreover, the District Court found spot market prices did not determine a "competitive market level" for Panhandle's long-term gas sales service (App. B-93-94), and made no finding that a "competitive market level" exists for such regulated services.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The State selectively excerpts findings of the District Court which, taken out of their proper context, grossly distort the decision of the District Court and its ultimate findings that Panhandle was entitled to adhere to the G-tariff and did not willfully exercise monopoly power in violation of the Illinois Antitrust Act. App. B-190-91, 196,

200. The court below unanimously affirmed these findings as not clearly erroneous and as properly based on the record. App. A-24-25, 35. The State never argued below that the G-tariff or the service agreements entered into thereunder were themselves unlawful or the result of willful monopolization. App. A-19 n.9, 35; B-194-96, 229-30. The District Court also rejected the State's assertion that Panhandle was obligated to give G-LDC's the total option to substitute spot market gas for purchases under the G-tariff, noting that both the FERC and the Court of Appeals for the District of Columbia Circuit rejected such an option due to the resulting huge take-or-pay exposure pipelines would face. App. B-174, 183-84, 189-90.

Contrary to the State's assertion (Pet. 11), the court below fully considered and agreed with the District Court's findings and analysis, and affirmed its judgment in Panhandle's favor. Much of the District Court's discussion to which the State now refers is a preliminary commentary made without regard to the regulatory context in which Panhandle's conduct occurred. However, the District Court was clear, in making its ultimate findings in Panhandle's favor, that:

> [T]hese findings must be considered in the context of what was going on in the marketplace at the time in question, including not only the relative price of spot market natural gas (as compared to natural gas under contract to Panhandle) but also the changing nature of the FERC regulations and the decisions by the District of Columbia Circuit Court of Appeals. (App. B-174)

See also App. B-111-12, 118-24, 189-96. In other words, "into this 'broth' must next be mixed the ingredient of regulation." App. B-174.

The State makes other material misstatements of the District Court's findings. (Pet. 9-10). Contrary to the State's assertions:

(a) Gas supplies available to consumers in Central Illinois were not curtailed or inadequate due to Panhandle's adherence to its G-tariff. In fact, a huge surplus of gas existed and Panhandle transported substantial volumes of spot market gas into Central Illinois and elsewhere. App. A-8, 18-19, 33-34; B-9, 34, 39-40.

(b) Residential and commercial consumers (who purchase gas from LDC's) did not have a demand for the purchase of gas separate from transportation service. The District Court found it was the G-tariff which bundled the sale and transmission of gas to G-LDC's. App. B-147, 218-19.

(c) Panhandle did not use its transmission facilities to foreclose competition in gas sales. The District Court found Panhandle possessed monopoly power (App. B-85), but held that it did not willfully exercise that power. App. B-139-48, 173, 184, 190-97, 200.

(d) Panhandle's adherence to the G-tariff in implementing the FERC's transportation programs—which the State characterizes as "segmentation of its market and price discrimination"—was not willful or done with an anticompetitive intent. To the contrary, the terms of the G-tariff and of the FERC's transportation orders fully explained and justified Panhandle's actions. App. A-31-34.

The State draws extensively from the discussion by the courts below of the regulatory and business justification defenses. However, that discussion is not material here because neither defense was a basis for the District Court's finding that Panhandle did not act willfully in adhering to its G-tariff or the affirmance of that finding by the court below.

THE PETITION PRESENTS NO REASONS FOR ISSUING A WRIT OF CERTIORARI

The Petition does not raise "important issues of federal antitrust law" (Pet. 12) or even a federal question, nor does the finding below that Panhandle did not willfully exercise monopoly power conflict with applicable decisions of this Court or Courts of Appeals.[2] The court below applied *Kansas v. Utilicorp United, Inc.*, ___ U.S. ___, 110 S. Ct. 2807 (1990), to dismiss the State's federal damage claims, which the District Court had already denied on the merits, and ruled that its claims for injunctive relief are moot. App. A-16. The State does not seek review of these holdings. The courts below referenced federal antitrust cases in ruling on the State's claims under the Illinois Antitrust Act. However, the State has not shown this can raise an important issue of federal law, or create a conflict with the decisions on federal claims the State references (none of which applied or construed the Illinois Antitrust Act). Even if this were possible, there is no important issue or conflict here.

As to the indirect purchaser damage claims under the Illinois Antitrust Act which are at issue here, the courts below found Panhandle was entitled to adhere to the G-tariff:

> The district court found that Panhandle's intransigence regarding the G-tariff was genuinely and rea-

[2] While questions exist whether the Illinois Antitrust Act, as the State seeks to apply it here, is preempted by federal regulation and imposes an undue burden on interstate commerce, and whether Panhandle's adherence to its approved tariff is impliedly immune from antitrust claims, the judgment in Panhandle's favor makes it unnecessary for the Court to address these issues.

> sonably motivated by the need to limit its potential take-or-pay liability, not by a desire to maintain its monopoly position by excluding competition in the sale of natural gas. In the district court's view that concern, when coupled with the regulatory flux the natural gas industry was undergoing at the time, was sufficient to negate the possibility that Panhandle was motivated by anticompetitive intent. That finding is one of fact to which we must defer since there is ample evidence to support it.
>
> In any event, it is one with which we agree. . . . Panhandle had incurred obligations itself in reliance on the G-tariff and to satisfy its regulatory obligations to anticipate and meet future customer demand. CILCO and Panhandle's other LDC customers were, in turn, obligated to buy their full requirements for gas from Panhandle. We do not believe that it was "anticompetitive" for Panhandle to hold them to that deal. (App. A-24-26) (citations and footnotes omitted)

The District Court's findings are "eminently reasonable". App. A-35. Factual findings in which two lower courts concur will be accepted by this Court "in the absence of very exceptional showing of error." *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 214 (1948); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 403 (1940). The State has utterly failed to make any such showing here.

A. The Court Below Did Not Create a New Standard of Anticompetitive Intent or Business Justification

The State argues the court below created a "new standard" of anticompetitive intent or business justification under which it focused solely on the reasons "why" Panhandle did what it did rather than on the "likely effects" of what it did. (Pet. 17) To the contrary, the court below

applied the proper general standard of anticompetitive intent (App. A-21-25), and in doing so considered the likely effects of Panhandle's conduct. The court concluded the State's proposed drastic restructuring of contractual and regulatory obligations would be inefficient and harmful to consumers. App. A-25-27. The District Court also considered the business and regulatory reasons for Panhandle's adherence to the G-tariff and found they negated the possibility that Panhandle acted with an anticompetitive intent. App. A-25. The State's unfounded "business justification" standard would "read 'intent' out of the monopolization equation" and would impose unwarranted affirmative obligations on Panhandle, which the court below correctly refused to do. App. A-22, 26-27.

The State's argument totally ignores regulatory obligations and the complex system of tariffs and long-term service agreements which govern the operations of Panhandle and G-LDC's. These obligations were a principal and necessary focus of the courts below, because neither Panhandle's intent nor the likely effects of its conduct could be assessed properly without careful consideration of FPC and FERC regulation. The State incorrectly suggests the court below upheld Panhandle's conduct merely because it was intended to protect Panhandle's corporate profits. (Pet. 19-20) Rather, Panhandle was entitled to avoid self-annihilation through the tremendous take-or-pay exposure it would face if G-LDC's abrogated their long-term service agreements. Panhandle had normal and non-exclusionary business purposes, under the system of regulatory obligations and restraints which govern its conduct, to continue supplying gas to G-LDC's, for the duration of their service agreements, with gas Panhandle committed to purchase to satisfy its service obligations. App. A-25-26 & n.14.

The State also incorrectly characterizes Panhandle's continued adherence to the G-tariff as an unlawful denial of access to a "bottleneck" or "essential facility." The courts below found Panhandle controlled no such facility. App. A-23-24; B-144-46, 209. The G-tariff and the FERC's own regulatory actions established the G-LDC's obligation to purchase all of their gas from Panhandle. App. A-25-31; B-121, 189-90, 194-96.

The decision of the court below is not in conflict with *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), or the other decisions the State cites incorrectly with respect to its unfounded "business justification" standard. (Pet. 17-24) These decisions do not support the State's assertion that a company subject to pervasive regulation, such as Panhandle, may not lawfully operate under government-approved tariffs and long-term service agreements. *Aspen Skiing* does not deem to be exclusionary all conduct which is not affirmatively procompetitive or efficiency-enhancing. The Court there affirmed a jury verdict that the defendant acted with an anticompetitive intent in terminating an established joint lift ticket program with a competitor. However, this program provided immediate benefits to the defendant and consumers, and cost the defendant nothing, although terminating the program placed its competitor at a significant disadvantage. *Id.* at 610.

The jury in *Aspen Skiing* was instructed that a company with monopoly power is under no duty to cooperate with rivals, and its refusal to continue an established cooperative arrangement is proper if done for legitimate business reasons—"the concern is with conduct which unnecessarily excludes or handicaps competitors." *Id.* at 597. In affirming the verdict, this Court observed that the defendant "did not persuade the jury that its conduct was

justified by any normal business purpose." *Id.* at 608. The Court's decision confirmed that issues of anticompetitive intent and normal business purpose are questions of fact as to which the reviewing court must defer if the finding has support in the record.

The finding here that Panhandle did not willfully exercise monopoly power by continuing to provide gas sales service to G-LDC's pursuant to their service agreements presents no conflict with the decision in *Aspen Skiing.* The regulatory and market conditions here depart significantly from the facts in *Aspen Skiing.* The FPC originally ordered Panhandle to provide gas sales service to many of the G-LDC's, and required Panhandle to secure long-term gas supplies to meet their needs. App. A-26 n.14. The G-tariff and long-term service agreements were approved by the FPC, and undisputedly were valid and enforceable. Panhandle provided a highly desirable gas sales service thereunder to customers. The cost to Panhandle of G-LDC's abrogating their long-term service agreements could have been huge and potentially crippling. App. A-24-25; B-63-64, 69-70, 120-22, 189-90, 194. Moreover, interference with these lawful agreements would have harmed consumers and been inefficient. App. A-27.

The courts below correctly applied the general standard of anticompetitive intent to which the jury was instructed in *Aspen Skiing.* The distinct facts regarding regulatory obligations, contractual arrangements, and the likely adverse impact of interference with these arrangements, fully support the finding that Panhandle did not act with an anticompetitive intent in adhering to its G-tariff.

In *Otter Tail,* the Court affirmed a jury verdict that Otter Tail had engaged in willful monopolization by refusing to "wheel" electric power to former customers. *Otter Tail* is factually different from this case and inapplicable:

> Critical to the Court's analysis in *Otter Tail*, however, was the fact that Otter Tail's franchise contracts with the towns had expired; they were no longer contractually bound to use Otter Tail's distribution facilities. Panhandle's G-tariff customers, by contrast, were contractually obligated to purchase their gas requirements from Panhandle, and Panhandle had itself entered into contractual obligations with gas producers in reliance on the demand anticipated from its customers.
>
> These distinctions make all the difference. . . . As the district court correctly observed, *Otter Tail* "does *not* stand for the proposition that a utility must renegotiate extant long-term service agreements to enable a customer to supplant the utility as its sole supplier." 730 F. Supp. at 909 (emphasis in original). (App. A-28-29) (footnotes omitted)

The jury in *Otter Tail* found the defendant had no legitimate business reasons for refusing to wheel power. The opposite is true here—Panhandle was justified in declining "to permit its customers to avoid their contractual obligations when to do so would be to expose itself to enormous take-or-pay obligations." App. A-29. Moreover, unlike in *Otter Tail*, the transportation service the State sought to compel here would have driven up the cost of Panhandle's gas sales service to other customers, because the FERC approved recovery of take-or-pay costs through gas sales rates but not through transportation rates. App. B-107-08, 121.

None of the other cases to which the State refers (Pet. 21-22) held conduct consisting solely of "adherence to . . . tariffs or contracts" to be unlawful, and none conflicts with the decisions below. In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the Court reversed a grant of summary judgment for defendant Detroit Edison because its

sales of light bulbs pursuant to a state utility tariff were not immune from federal antitrust claims under the State Action doctrine. The Court in *Cantor* had no occasion to consider whether, on the merits, defendant's conduct in the sale of light bulbs, an "essentially unregulated" activity, was willful or monopolistic. *Id.* at 581-82, 595.

In *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), the Court affirmed a finding that defendant's "block booking" of copyrighted feature films for television exhibition was an illegal tying arrangement. No such conduct was at issue here. Panhandle sold a single service (delivered gas) to G-LDC's pursuant to a long-standing regulatory tariff and service agreements. The defendant in *Loew's* had no regulatory authority to engage in block booking, and was not adhering to government approved tariffs or contracts. The decision in *Loew's* is based on a totally dissimilar factual and market setting and has no bearing here.

In *United States v. Griffith*, 334 U.S. 100 (1948), the Court held defendants used their position as the only theater operator in numerous small towns to secure preferential exhibiting terms from motion picture distributors for other towns in which they faced competition. No such conduct is at issue here. Panhandle operated under separate, FPC-approved service agreements with each of its G-tariff customers in Central Illinois, and did not use its service agreement with one LDC to secure the right to serve others.

In *Poster Exchange, Inc. v. National Screen Serv. Corp.*, 431 F.2d 334 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971), the court of appeals affirmed a finding that an exclusive licensee of accessories for motion picture producers improperly eliminated competing sublicensees through refusals to deal and excessive sublicense fees. No such con-

duct is at issue here. Moreover, the defendant in *Poster Exchange* did not operate under regulatory tariffs and contracts—it was the defendant's predatory elimination of competing sublicensees, not its continued sales to its own customers, which was found to be improper.

Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island, 883 F.2d 1101 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990), is fully consistent with the decisions below. There the court held Blue Cross was justified in reducing its own costs by refusing to pay more than physicians received from Blue Cross' competitors, despite the fact it did not pass along the savings to subscribers. *Id.* at 1111 n.11. Thus, the case actually refutes the State's contention that a legitimate business purpose is recognized only for conduct which results in the heightening of competition or the supply of a "better" product or service.

The State's reference to tying cases (Pet. 18-19) is inappropriate because the District Court found Panhandle had not tied gas sales and transportation services. Rather, the FPC bundled the two through its approval of the G-tariff. App. B-219. Moreover, each of the cases was brought under Section 1 of the Sherman Act and presented no issue of the willful exercise of monopoly power. Here, the State on appeal argued the alleged tying was an exclusionary practice relevant only to its Section 2 monopolization claim, and the court below so treated it. App. A-11 n.6. The discussion of a general balancing standard in the concurring opinion in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 43-44 (1984) (Pet. 18), presents no conflict here. The courts below thoroughly considered the benefits of the G-tariff and the regulatory obligations of Panhandle and the G-LDC's, and concluded it would be

inefficient and harmful to consumers to permit the abrogation of long-term service agreements. App. A-25-27; B-218-19. The other tying cases the State cites—*Metrix Warehouse, Inv. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1040-41 (4th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988); *Mozart Co. v. Mercedes Benz of North America, Inc.*, 833 F.2d 1342, 1348-51 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988); and *Image Technical Services, Inc. v. Eastman Kodak Co.*, 903 F.2d 612 (9th Cir.), *cert. granted*, ____ U.S. ____, 111 S. Ct. 2823 (1991) (Pet. 19)[3]—addressed the business justification for tying arrangements involving authorized replacement parts. None of these decisions limits the range of normal business practices that may be considered in assessing the willful intent necessary to prove a monopolization claim.

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[3] Contrary to the State's suggestion (Pet. 15), the Court's review of the decision in *Image* cannot create a conflict with the decisions below here. In *Image*, the court of appeals reversed a summary judgment ruling in Kodak's favor on Section 2 claims. It held a disputed issue of material fact existed as to whether Kodak's proffered business reasons for its refusal to supply replacement parts for use by independent service organizations were pretextual. The Ninth Circuit rejected a "free rider" justification not at issue here, but did not reject Kodak's other business reasons as a matter of law. An affirmance of this ruling would still necessitate a trial on the validity of Kodak's business reasons, and could not conflict with the finding here—after a trial on the merits—that Panhandle did not willfully exercise monopoly power. If, on the other hand, the Court were to reverse and hold as a matter of law that Kodak's practices are proper (or could be based on the "free rider" justification), such a ruling also could not conflict with the decisions below. Moreover, the *Image* case presents issues of monopoly power over replacement parts and the burden a plaintiff faces to avoid summary dismissal of economically implausible antitrust claims. If the Court limits its consideration to these issues, its decision also could not create any conflict with the decisions below here.

The State's reference (Pet. 23) to *dicta* about the essential facilities doctrine in *Alaska Airlines v. United Airlines*, 1991-2 Trade Cas. (CCH) ¶69,624 at 66,793 (9th Cir. 1991), has no application. The court there held defendants had not denied plaintiffs access to an essential facility. Here, the court below affirmed the District Court's finding that Panhandle did not even control an essential facility. A-23-24; B-144-46, 214. Moreover, the State incorrectly asserts "Panhandle's refusal to grant access to independent gas producers was absolute and obliterated all chances of competition" (Pet. 23). Panhandle transported third-party gas for industrial end-users and even G-LDC's when the FERC authorized it under "special marketing" and other programs. App. A-8-9, 34; B-33-34, 39-40. As the court below observed, "[h]ad Panhandle's goal been to exclude other sellers from central Illinois, it would not have transported gas under any program, whether or not it provided take or pay credit." App. A-34.

B. The Decision of the Court Below is not Premised on Erroneous Economic Assumptions

The decision below is not based on "erroneous economic assumptions" (Pet. 24-25). Rather, the State's arguments reveal its true purpose in this case—to use the guise of antitrust claims to completely remake the federal regulatory scheme for pipeline services, tariffs and rates. Congress in the NGPA mandated that consumers bear the actual cost of gas sold. App. A-3; B-19-20, 102-03, 108-11; *see also Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 416 (1986) ("Congress expressed a clear intent in enacting the NGPA that all reasonable costs of production of natural gas shall be borne ultimately by the consumer"); *Office of Consumers' Counsel v. FERC*, 914 F.2d 290, 292 (D.C. Cir. 1990); H.R.

Conf. Rep. No. 1752, 95th Cong. p. 124, 1978 U.S. Code Cong. & Ad. News at 9041 ("conference agreement guarantees that interstate pipelines may pass through costs of natural gas purchases if the price . . . does not exceed the ceiling price levels"). It did so to address severe gas shortages in the 1970's, to which Panhandle responded with the full support of the State by securing sorely needed gas supplies for Illinois consumers. App. B-20-24.

The court below did not, as the State asserts (Pet. 24), assume that Panhandle was insensitive to the prices at which it contracted to purchase gas. The State's assertions about Panhandle's gas contracting practices were fully considered and rejected by the courts below and these practices have been upheld in regulatory proceedings. App. A-4 & n.3; B-121-24. Moreover, the State's assertion is illogical. Panhandle had strong incentives to pay no more than necessary in its gas supply contracts because of the risk of load loss to other pipelines and alternate fuels, the risk of take-or-pay liability, and the very nature of its FERC-approved rate structure. App. B-77-83, 87-91, 104-06.

The State also erroneously asserts Panhandle unlawfully earned monopoly profits because its rate for gas sales service was above the "competitive market price" (Pet. 25). The District Court made no such finding, and rejected the use of spot market prices as an acceptable level for pipeline gas sales rates under long-term service agreements. App. B-93-94. In addition, the State's assertion is inappropriate in light of the complex system of regulatory and contractual obligations under which Panhandle and other pipelines have been required to operate. App. A-19, 25-26 & n.14; B-186-87, 194-95. The FPC and the FERC have developed this system to satisfy their Congressional mandate, which "is to assure adequate natural gas supplies at fair prices", *Transcontinental* , 474 U.S. at 421, not to require that all pipelines achieve the lowest possible short-term gas costs.

Panhandle earned no monopoly profits by adhering to long-term service agreements with G-LDC's (App. A-30-31, 33-34), and it did not evade any regulatory constraints on the level of its rates. Panhandle was not operating in "a deregulated market" and Congress did not mandate in the NGPA "that competition must replace regulation" (Pet. 25). *See* App. A-29-30; B-174-90. Thus, the State's premises, its analysis, and its conclusion are all erroneous and suggest no error in the finding that Panhandle did not willfully exercise monopoly power.

C. The Court Below Did Not Utilize An Improper Antitrust Analysis

The State is incorrect in asserting (Pet. 26-30) that the court below failed to consider the impact of Panhandle's challenged conduct on "the satisfaction of consumers" and on competition as a whole "in the market place." The court below found that abrogation of long-term service agreements would be inefficient and harmful to consumers. App. A-29. Moreover, the State completely ignores the impact of regulation. G-LDC's were obligated to purchase their gas requirements from Panhandle and Panhandle was obligated to secure gas supplies to meet their needs. App. A-18-19. The NGPA did not jettison any of these obligations, nor did it mandate free and open competition among pipelines or other sellers. To the contrary, pipelines remained subject to pervasive regulation and long-term service agreements remained in effect. App. A-29-30; *Schneidwind, supra.*

The cases the State now cites (none of which it cited below) do not support its argument, and do not conflict in principle or otherwise with the decisions below. *National Soc. of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Federal Trade Comm'n v. Indiana*

Fed. of Dentists, 476 U.S. 447 (1986); and *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), did not involve regulated industries and, unlike here, all involved horizontal arrangements or conspiracies among competitors. In fact, *Professional Engineers* and *Superior Court Trial Lawyers* involved *per se* price fixing arrangements which, unlike the conduct at issue here, are illegal without regard to the defendant's intent or the business reasons for its actions. Moreover, nothing in these decisions precludes consideration of the pervasive regulation mandated by Congress which governs Panhandle's services, tariffs and rates, and which itself establishes limits on competition.

The other cases the State cites (Pet. 28-29) decided no claims under antitrust law, but rather were challenges to the FERC's exercise of regulatory discretion. In *Environmental Action Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991), the court held the FERC had not properly exercised its discretion in approving the merger of two electric utilities, and remanded for further consideration. At issue there was the Congressional mandate in the Public Utility Regulatory Policy Act, 16 U.S.C. § 824a-3, to encourage sales of electric power by small producers and cogenerators. However, the State is incorrect in arguing that likewise "Congress in enacting the NGPA decreed that there was to be competition in gas sales." (Pet. 28). The NGPA only deregulated producer's gas prices at the wellhead and did not deregulate pipeline services, tariffs or the rates they may charge customers. App. A-3-5 & n.4, 29-30; B-7-8, 101, 168.

In *Maryland People's Counsel v. FERC*, 761 F.2d 768 (D.C. Cir. 1985) ("MPC I"), and *Maryland People's Counsel v. FERC*, 761 F.2d 780 (D.C. Cir 1985) ("MPC II")

(Pet. 29), the court found the FERC had not adequately considered or explained the *possible* consequences of its own experimental transportation and special marketing programs which were designed to retain fuel-switchable end-users as gas consumers, and had not adequately justified the exclusion of other end-users. App. A-9. The court did not address any claims under antitrust law and did not find any pipeline had willfully exercised monopoly power. Indeed, the court below considered these decisions (A-31-34) and found them to be irrelevant:

> FERC may or may not have adequately justified its reasons for approving such programs, *see MPC I*, 761 F.2d at 774, but that fact is not relevant to the issue of whether Panhandle's actions under the FERC programs constituted an unlawful exercise of monopoly power. As unbundled transportation became the norm in the industry, the FERC programs were the principal means available to Panhandle for resolving its take-or-pay dilemma. Panhandle's implementation of these programs reinforces the conclusion that it was the discrepancy between spot market and contract prices for gas, rather than exclusionary animus, that drove Panhandle's policies. (App. A-34)

Contrary to the State's assertion (Pet. 26), the courts below did not rule in Panhandle's favor because it would be unfair to require Panhandle to compete. Rather, regulatory and market facts showed Panhandle's ongoing operation under approved and long-standing tariff and contractual arrangements was not motivated by an anticompetitive intent, but by normal and legitimate business reasons in a complex and chaotic regulatory environment. This finding has both factual and logical support, and conflicts with no controlling or relevant decisions of this Court or courts of appeals.

CONCLUSION

The Petition establishes no grounds meriting further review by the Court. The courts below misapprehended no controlling legal standard and committed no error in weighing the evidence in the record. The Petition should be denied.

Respectfully submitted,

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